Gnanasekaran a/l Krishnasamy v Suruhanjaya Perkhidmatan Awam, Malaysia & Anor

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 01(F)-4 OF 2009 (W)
RICHARD MALANJUM CJ (SABAH AND SARAWAK), HASHIM YUSOFF AND JAMES FOONG FCJJ
26 APRIL 2010

Labour Law — Employment — Dismissal — Appeal against — Disciplinary action against appellant under general order 26 of the Public Officers (Conduct and Discipline) General Orders 1980 ('the GO') — Refusal by High Court and Court of Appeal to allow appellant to amend statement of claim — Decision of Federal Court in Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v Utra Badi a/l K Perumal ('Utra Badi case') — Whether there was right to mitigate before imposition of punishment for disciplinary offence under the GO — Whether Utra Badi case contrary to rules of natural justice and ought to be reviewed

The appellant was employed as a timescale security officer in the Administration and Finance Division, of the Prime Minister's Department ('the employer'). By a letter dated 26 June 1992 the employer preferred two charges against the appellant. The first charge was in relation to the appellant being absent from work in the morning on 9 May 1991 from 7.10am to 7.30am and the second charge was in relation to the appellant having punched a senior officer of the same division on 15 May 1991. By the same show cause letter the appellant was also informed that disciplinary proceedings would be taken against him with a view to dismissal or reduction in rank under the general order 26 of the Public Officers (Conduct and Discipline) General Orders 1980 ('the GO'). In his letter dated 15 July 1992, the appellant admitted the disciplinary offences as disclosed in the charges but gave the reasons or the circumstances for their commission. He sought for forgiveness and undertook not to repeat such actions in future. On 21 August 1992, the disciplinary board ('the DB') found the appellant guilty of the two charges and decided to impose dismissal as the appropriate punishment against the appellant. When the appellant's appeal to the disciplinary appeal board was dismissed the appellant appealed to the High Court. In the trial before the High Court the appellant attempted to amend his statement of claim to add in the additional ground that the failure to give him an opportunity to make a plea in mitigation before punishment was meted out by the DB nullified his dismissal. The trial judge refused to allow the appellant to amend his statement of claim in view of the decision of the Federal Court in *Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v Utra Badi a/l*

K Perumal [2001] 2 MLJ 417 ('the *Utra Badi* case'). When the High Court dismissed the appellant's action, the appellant appealed to the Court of Appeal. The Court of Appeal found that the trial judge was right in refusing the appellant's application to amend the statement of claim in view of the *Utra Badi* case wherein it was held that there was no separate right to mitigate on punishment after a public officer was found to have committed a disciplinary offence. This was the appellant's appeal against that decision. Although there were several reasons given by the High Court and the Court of Appeal in dismissing the appellant's claim for wrongful dismissal, leave to appeal to the Federal Court was only allowed to consider whether there was a right to mitigate before the imposition of punishment for a disciplinary offence under the GO. At the outset of the hearing of this appeal the respondents had raised the preliminary objection that the issue raised by the appellant in this appeal was neither an issue pleaded in the statement of claim nor an issue decided by the High Court. In reply the appellant argued that he had raised the issue of the right to mitigate before the High Court but the trial judge had failed to consider it because he was bound by the *Utra Badi* case. Thus the main issue for consideration in this case was whether the Federal Court was correct in its conclusion in the *Utra Badi* case.

Held, dismissing the appeal with costs:

(1) The preliminary objection was dismissed because in an indirect way the issue of whether there is a right to mitigate before punishment is imposed under the GO was before the High Court for consideration. However, in view of the decision of the *Utra Badi* case, the High Court judge had no choice but to decide as he did. Thus, since the issue raised by the appellant was focused on the decision in the *Utra Badi* case, it was only fair that this appeal should not be dismissed in limine (see para 16).

(2) The Federal Court was not bound by its own earlier decision and may depart from it where necessary. As explained in the *Utra Badi* case, the relevant provisions of the GO provide clear procedures and steps to be taken against an officer facing a disciplinary action. For instance under order 26, a prima facie case must be first found in a complaint against an officer before a charge is served on him; and in the charge itself the officer is made aware of the possible punishments if he fails to make his representations or if he does not exculpate himself. In fact under order 26(4) punishment is only imposed in obvious and clear cases of guilt as per the charge. The procedures prescribed in the GO and in particular order 26 thereof were not intended to find the guilt or innocence of an officer charged as in a criminal trial. As such an officer who is served with a show cause letter stating the disciplinary offence he is charged with and the possible punishment that could be meted out to him was already given the opportunity to make any representations as required

to exculpate himself and did not require another hearing before punishment was meted out to him. In any case in the instant appeal the appellant admitted to the disciplinary offence as charged and sought for forgiveness. As such, he had on his own volition made his plea of mitigation in the same representation and the question of him being prejudiced did not arise (see paras 26 & 33–35).

(3) The conclusion in the *Utra Badi* case was not contrary to the rules of natural justice and therefore there was no need to review the decision in that case (see paras 36–37).

[Bahasa Malaysia summary

Perayu bekerja sebagai pegawai sekuriti skala masa di Bahagian Pentadbiran dan Kewangan di Jabatan Perdana Menteri ('majikan'). Melalui surat bertarikh 26 Jun 1992 majikan mengenakan dua tuduhan terhadap perayu. Tuduhan pertama berkaitan ketidakhadiran perayu di tempat kerja pada pagi 9 Mei 1991 dari 7.10 pagi hingga 7.30 pagi dan tuduhan kedua adalah berkaitan perayu menumbuk pegawai kanan bahagian yang sama pada 15 Mei 1991. Melalui surat tunjuk sebab yang sama perayu juga diberitahu bahawa prosiding tatatertib akan diambil terhadapnya dengan pertimbangan pemecatan atau turun pangkat di bawah perintah am 26 Perintah-Perintah Am (Kelakuan dan Disiplin) 1980 ('Perintah-Perintah Am'). Di dalam suratnya bertarikh 15 Julai 1992, perayu mengaku terhadap kesalahan-kesalahan tatatertib seperti yang dikemukakan di dalam tuduhan-tuduhan tetapi memberi alasan-alasan atau keadaan-keadaan kenapa ia dilakukan. Dia memohon maaf dan berjanji tidak mengulangi tindakan sebegitu pada masa hadapan. Pada 21 Ogos 1992, lembaga tatatertib ('Lembaga') mendapati perayu bersalah terhadap kedua-dua tuduhan dan memutuskan untuk melakukan pemecatan sebagai hukuman wajar terhadap perayu. Apabila rayuan perayu ditolak oleh Lembaga Rayuan Tatatertib perayu merayu kepada Mahkamah Tinggi. Dalam perbicaraan di hadapan Mahkamah Tinggi perayu mencuba untuk meminda pernyataan tuntutannya untuk memasukkan alasan tambahan bahawa kegagalan memberikan dia peluang untuk membuat pli peringanan sebelum hukuman dikenakan oleh Lembaga membatalkan pemecatannya. Hakim bicara menolak daripada membenarkan perayu meminda pernyataan tuntutannya berikutan keputusan Mahkamah Persekutuan dalam kes *Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v Utra Badi a/l K Perumal* [2001] 2 MLJ 417 ('kes *Utra Badi*'). Apabila Mahkamah Tinggi menolak tindakan perayu, perayu merayu kepada Mahkamah Rayuan. Mahkamah Rayuan mendapati bahawa hakim bicara betul apabila menolak permohonan perayu untuk meminda pernyataan tuntutan berikutan kes *Utra Badi* di mana ia diputuskan bahawa tidak terdapat hak berasingan untuk meringankan hukuman selepas pegawai am didapati melakukan kesalahan tatatertib. Ini adalah rayuan perayu terhadap keputusan tersebut. Walaupun terdapat beberapa alasan diberikan oleh Mahkamah Tinggi dan Mahkamah

Rayuan di dalam menolak tuntutan perayu untuk pemecatan salah, keizinan untuk merayu kepada Mahkamah Persekutuan hanya dibenarkan untuk mempertimbangkan sama ada terdapat hak untuk meringankan sebelum pengenaan hukuman untuk kesalahan tatatertib di bawah Perintah-Perintah Am. Pada permulaan perbicaraan responden-responden membangkitkan bantahan awalan bahawa isu yang dibangkitkan oleh perayu di dalam rayuan ini bukan isu yang diplidkan di dalam pernyataan tuntutan juga bukan isu yang diputuskan di Mahkamah Tinggi. Sebagai balasan perayu berhujah bahawa dia membangkitkan isu hak untuk memohon peringanan hukuman di hadapan Mahkamah Tinggi tetapi hakim bicara telah gagal untuk mempertimbangkannya kerana dia terikat dengan kes *Utra Badi*. Oleh itu isu utama untuk pertimbangan di dalam kes ini adalah sama ada Mahkamah Persekutuan betul dalam keputusannya di dalam kes *Utra Badi*.

Diputuskan, menolak rayuan dengan kos:

(1) Bantahan awalan ditolak kerana secara tidak langsung isu sama ada terdapat hak untuk meringankan sebelum hukuman dikenakan di bawah Perintah-Perintah Am adalah untuk pertimbangan di hadapan Mahkamah Tinggi. Walau bagaimanapun, berikutan keputusan kes *Utra Badi*, hakim Mahkamah Tinggi tidak mempunyai pilihan tetapi untuk memutuskan seperti yang dilakukannya. Oleh itu, memandangkan isu yang dibangkitkan oleh perayu tertumpu kepada keputusan kes *Utra Badi*, adalah adil bahawa rayuan ini tidak patut ditolak in limine (lihat perenggan 16).

(2) Mahkamah Persekutuan tidak terikat dengan keputusannya yang terdahulu dan boleh menyimpang daripadanya apabila perlu. Seperti yang dijelaskan di dalam kes *Utra Badi*, peruntukan-peruntukan relevan Perintah-perintah Am memperuntukkan prosedur-prosedur jelas dan langkah-langkah yang akan diambil terhadap pegawai yang berhadapan dengan tindakan tatatertib. Contohnya di bawah perintah am 26, kes prima facie mesti diputuskan dahulu di dalam aduan terhadap pegawai sebelum tuduhan diserahkan kepadanya; dan di dalam tuduhan tersebut pegawai diberitahu mengenai hukuman-hukuman yang berkemungkinan jika dia gagal untuk membuat representasinya atau jika dia tidak membebaskan dirinya daripada kesalahan tersebut. Sebenarnya di bawah perintah am 26(4) hukuman hanya dikenakan di dalam kes-kes yang terang dan nyata kebersalahannya seperti tuduhan tersebut. Prosedur-prosedur yang dijelaskan di dalam Perintah-Perintah Am dan terutamanya perintah am 26 di dalamnya bukan diniatkan untuk mencari kebersalahan atau ketakbersalahan pegawai yang dituduh seperti di dalam perbicaraan jenayah. Oleh itu pegawai yang diserahkan surat tunjuk sebab yang menyatakan kesalahan tatatertib yang dikenakan dan hukuman munasabah yang boleh dikenakan terhadapnya telah diberikan

peluang untuk membuat apa-apa representasi seperti yang diperlukan untuk membebaskan dirinya daripada kesalahan dan tidak diperlukan pendengaran yang lain sebelum hukuman dikenakan terhadapnya. Walau bagaimanapun dalam kes ini perayu mengaku terhadap kesalahan tatatertib seperti yang dituduh dan memohon maaf. Oleh itu, dia dengan kerelaannya sendiri membuat pli peringanan di dalam representasi yang sama dan persoalan bahawa dia diprejudiskan tidak berbangkit (lihat perenggan 26 & 33–35).

(3) Keputusan dalam kes *Utra Badi* bukan bertentangan dengan peraturan-peraturan keadilan sejagat dan oleh itu tidak perlu untuk menyemak keputusan tersebut (lihat perenggan 36–37).]

Notes

For dismissal, see 8(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 948–1000.

Cases referred to

Anandarajan & Ors v Mahadevan [1971] 2 MLJ 8, FC (refd)

Ahmad Jefri bin Mohd Jahri @ Md Johari v Pengarah Kebudayaan & Kesenian Johor and others [2010] MLJU 195, FC (refd)

Ghanasekaran a/l Krishnasamy v Suruhanjaya Perkhidmatan Awam Malaysia and Anor [2009] 3 MLJ 798, CA (refd)

Halimatussaadiah v Public Service Commission, Malaysia & Anor [1992] 1 MLJ 513, HC (folld)

Inspector-General of Police & Anor v Alan Noor bin Kamat [1988] 1 MLJ 260, SC (refd)

Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v Utra Badi a/l K Perumal [2001] 2 MLJ 417, FC (folld)

Lembaga Tatatertib Perkhidmatan Awam, Hospital Besar Pulau Pinang v Utra Badi a/l K Perumal [2000] 3 MLJ 281, CA (not folld)

Tan Ying Hong v Tan Sian San & Ors [2010] 2 MLJ 1; [2010] 2 CLJ 269, FC (refd)

Legislation referred to

Constitution of India [IND] art 311(2)
Federal Constitution art 135(2)
Public Officers (Conduct and Discipline) (Chapter D) General Orders 1980 general order 26, 26(4), (5)

Appeal from: Civil Appeal No W-01–98 of 2007 (Court of Appeal, Putrajaya)

Karpal Singh (Karpal Singh & Co) for the appellant.
Azizah Nawawi (Senior Federal Counsel, Attorney General's Chambers) for the respondents.

Richard Malanjum CJ (Sabah and Sarawak) (delivering judgment of the court):

[1] On 5 March 2009 this court allowed one question for its consideration when granting the appellant leave to appeal. The Court of Appeal had dismissed his appeal against the decision of the High Court rejecting his claim for wrongful dismissal.

[2] The question reads:

> Whether the Federal Court in *Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v Utra Badi a/l K Perumal* [2001] 2 MLJ 417 was in fact right in concluding that there was no separate right to mitigate on punishment after a public officer was found to have committed a disciplinary offence and whether the Federal Court should review its previous decision in *Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v Utra Badi a/l K Perumal* [2001] 2 MLJ 417 as the said decision cannot stand close scrutiny in logic and the application of the rules of natural justice.

[3] Simply put the question is asserting that in term of logic and the rules of natural justice the decision of this court in *Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v Utra Badi a/l K Perumal* ('*Utra Badi* case') should not be sustained.

[4] Our task therefore is to re-examine that decision and to conclude whether we agree with it or the assertion of the appellant. But first the brief background facts.

[5] In 1976 the appellant was a public officer employed by the second respondent, Government of Malaysia, holding the post of timescale security officer in the Administration and Finance Division, Prime Minister's Department. He started his employment with the second respondent as a general labourer in 1974.

[6] By a letter dated 26 June 1992 the Chairman of the Group D Disciplinary Board of the Administration and Finance Division of the Prime Minister's Department wrote to the appellant informing him that the disciplinary board ('DB') was of the opinion that disciplinary action ought to be taken against him with a view of dismissal or reduction in rank under the general order 26 of the Public Officers (Conduct and Discipline) (Chapter D) General Orders 1980 ('the GO').

[7] In the said letter two charges were preferred against the appellant. The first was in relation to him being absent from work in the morning on 9 May

1991 from 7.10am to 7.30am. The second was related to an incident of him punching a senior timescale security officer of the same division on 15 May 1991. The appellant was asked to make a representation in writing in his defence. It was also made clear to the appellant that failing to make his representation within 21 days for the receipt of the said letter would be assumed that he was not defending himself and the matter would be decided by the DB based on the evidence available.

[8] By a letter dated 15 July 1992 the appellant submitted his representation. He admitted the disciplinary offences as disclosed in the charges but gave the reasons or the circumstances for their commission. He sought for forgiveness and undertook not to repeat them in future.

[9] On 21 August 1992, the DB, after considering the charges and the representations made by the appellant as contained in his letter, found him guilty on the two charges. The DB also decided to impose dismissal as the appropriate punishment against the appellant. His subsequent appeal to the disciplinary appeal board was dismissed on 15 March 1993.

[10] On 26 November 1993, the appellant commenced legal action by way of writ action against the respondents for wrongful dismissal. It is not in the appeal record that the respondents objected to the mode of commencement of action by the appellant. Thus, the issue as to the mode of commencement of action is not before us (see *Ahmad Jefri bin Mohd Jahri @ Md Johari v Pengarah Kebudayaan & Kesenian Johor and others* [2010] MLJU 195).

[11] The High Court on 24 August 2007 dismissed the action basically on the grounds:

(a) that there was no issue of the DB failing to give its reasons for finding him guilty of the offences since the appellant admitted committing the disciplinary offences as stipulated in the charges;

(b) that the unexplained delay in commencing disciplinary action against the appellant should not nullify his dismissal as there was no 'suggestion of the existence of some element behind the unexplained delay such as bad faith'; and

(c) that the application to amend the statement of claim to add another ground, namely, the failure to give the appellant an opportunity to make a plea in mitigation before the punishment was meted, in order to nullify the dismissal of the appellant had to be disallowed since it would be exercise in futility in view of the decision of this court in *Utra Badi* case.

[12] The appellant appealed to the Court of Appeal. In dismissing his appeal on 6 October 2008 the Court of Appeal held that:

(a) The learned trial judge was right in refusing to allow the application to amend the statement of claim of the appellant in view of the decision of this court in *Utra Badi* case.

(b) The learned trial judge did not err in refusing to find that the unexplained delay in commencing the disciplinary action against the appellant rendered the dismissal a nullity. The delay was only about one year and there was no allegation of bad faith. The appellant also admitted committing the offences. Each case should depend on its own facts.

(c) There was no evidence of condonation in any form on the part of the respondents for what the appellant had done.

(d) The disciplinary proceeding conducted against the appellant was in compliance with the GO. That 'Order 26(4) of the General Orders clearly provides that if the officer furnishes a representation which fails to exculpate himself to the satisfaction of the appropriate disciplinary authority, it shall then proceed to consider and decide on, inter alia, the dismissal of the officer. In his representation to the disciplinary authority, the appellant admitted having committed the offences that he was charged with. He then prayed for leniency and promised not to repeat such offences in the future. Under these circumstances, we find no injustice has been occasioned'.

[13] Although there were several reasons given by the High Court and the Court of Appeal in dismissing the claim by the appellant for wrongful dismissal this court only allowed him to pose one question as above. The basic issue is whether there is a right to mitigate before the imposition of punishment for disciplinary offence under the GO.

[14] At the outset of the hearing of this appeal learned senior federal counsel appearing for the respondents raised a preliminary objection. She pointed out that the issue covered by the question posed was not a pleaded issue in the statement of claim of the appellant nor was it an issue decided by the High Court.

[15] In response learned counsel for the appellant argued that they wanted the issue of right to mitigate considered by the High Court. However in view of the decision in *Utra Badi* case the High Court declined to allow the application to amend the statement of claim.

[16] We dismissed the preliminary objection. We were of the opinion that in an indirect way the issue of whether there is a right to mitigate before punishment is imposed under the GO was before the High Court for consideration. However, in view of the decision in *Utra Badi* case and being bound by it the learned High Court judge had no choice but to decide as he did. Thus, since the question posed is focused on the decision in *Utra Badi* case it is only fair that this appeal should not be dismissed in limine.

[17] In his submission before us for the appeal proper learned counsel for the appellant strenuously contended that there is such a right to mitigate upon being found guilty for disciplinary offence under the GO. He cited several decisions of the Indian courts to support his contention. He urged this court to depart from its earlier decision in *Utra Badi* case.

[18] In reply learned senior federal counsel submitted that there were two parts to the question posed. She argued that:

(a) In respect of the first part, namely, on the right to mitigate, the wordings of order 26(4) of the GO was correctly interpreted in *Utra Badi* case. Where an officer who is subject to the GO does not furnish his representation or that his representation fails to exculpate himself to the satisfaction of the disciplinary authority, the said order empowers the disciplinary authority *to proceed to consider and decide* on the dismissal or reduction in rank of the officer without the necessity of hearing his mitigation prior to the imposition of punishment. (Emphasis added.)

(b) In respect of the second part, that is, in relation to logic and the rules of natural justice, the decision in *Utra Badi* case does not go against the rules of natural justice. The rules of natural justice do not require that the appellant should have been given adequate notice of his impending punishment. 'What the rules of natural justice required was that the nature of the accusations, as opposed to the punishment which could be inflicted upon him if those accusations were proved to be true, was made known to him' (*Anandarajan & Ors v Mahadevan* [1971] 2 MLJ 8).

[19] Since the determination of the question posed calls for the re-examination on the interpretation of order 26, in particular order 26(4) of the GO as given in *Utra Badi* case it is only appropriate and for convenience that we should reproduce the relevant provisions herein in toto. Thus it reads:

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(1) Where it is represented to, or is found by, the appropriate Disciplinary Authority that an officer is guilty of unsatisfactory work or misconduct and

such work or misconduct, in the opinion of the Disciplinary Authority, merits dismissal or reduction in rank, the provisions of the following paragraphs shall apply.

(2) The appropriate Authority shall, after considering all the available information in its possession that there is a prima facie case for dismissal or reduction in rank, cause to be sent to the officer a statement in writing, prepared, if necessary with the aid of the Legal Department, of the ground or grounds; on which it is proposed to dismiss the officer or reduce him in rank and shall call upon him to state in writing within a period of not less than fourteen days from the date of receipt of the letter a representation containing grounds upon which he relies to exculpate himself.

(3) If after consideration of the said representation, the appropriate Disciplinary Authority is of the opinion that the unsatisfactory work or conduct of the officer is not serious enough to warrant dismissal or reduction in rank, the Disciplinary Authority may impose upon the officer such lesser punishment as it may deem fit.

(4) *If the officer does not furnish any representation within the specified time, or if he furnishes a representation which fails to exculpate himself to the satisfaction of the appropriate Disciplinary Authority, it shall then proceed to consider and decide on the dismissal or reduction in rank of the officer*. (Emphasis added.)

(5) Where the appropriate Disciplinary Authority considers that the case against the officer requires further clarification, it may appoint a Committee of Inquiry consisting of not less than two senior Government officers who shall be selected with due regard to the standing of the officer concerned and to the nature and gravity of the complaints which are the subject of the inquiry, provided that an officer lower in rank than the officer who is the subject of the inquiry or the officer's Head of Department shall not be selected to be a member of the Committee.

(6) The officer shall be informed that, on a specified day, the question of his dismissal or reduction in rank will be brought before the Committee and that he will be allowed and if the Committee shall so determined, shall be required to appear before the Committee and exculpate himself.

(7) If witnesses are examined by the Committee, the officer shall be given an opportunity to be present and to question the witnesses on his own behalf and no documentary evidence shall be used against him unless he has previously been supplied with a copy thereof or given access thereto.

(8) The Committee may, permit the Government or the officer to be represented by an officer in the public service or, in exceptional cases, by an advocate and solicitor and may at any time, subject to such adjournment as is reasonably necessary to enable the officer to present his case in person, withdraw such permission.

Provided that where the Committee permits the Government to be represented, it shall also permit the officer to be similarly represented.

(9) If, during the course of the inquiry, further grounds for dismissal are disclosed, and the appropriate Disciplinary Authority thinks fit to proceed

against the officer upon such grounds, the officer shall be furnished with a written statement thereof and the same steps shall be taken as are prescribed above in respect of the original grounds.

(10) The Committee having inquired into the matter, shall make a report to the appropriate Disciplinary Authority. If the Disciplinary Authority considers that the report is not clear in any respect or that further inquiry is desirable, the matter may be referred back to the Committee for further inquiry and report.

(11) If, upon considering the report of the Committee, the appropriate Disciplinary Authority is of the opinion —

(a) that the officer should be dismissed or reduced in rank, it shall forthwith direct accordingly;

(b) that the officer does not deserve to be dismissed or reduced in rank, but deserves some lesser punishment, it may inflict upon the officer such lesser punishment as it may deem fit; or

(c) that the proceedings disclose sufficient grounds for requiring him to retire in the public interest, it shall recommend to the Government accordingly. The question of pension will be dealt with under the Pensions Act.

[20] And in construing the foregoing provisions art 135(2) of the Federal Constitution should be borne in mind. It reads:

(2) No member of such a service as aforesaid shall be dismissed or reduced in rank without being given a reasonable opportunity of being heard:

Provided that this Clause shall not apply to the following cases:

(a) where a member of such a service is dismissed or reduced in rank on the ground of conduct in respect of which a criminal charge has been proved against him; or

(b) where the authority empowered to dismiss or reduce in rank a member of such a service is satisfied that for some reason, to be recorded by that authority in writing, it is not reasonably practicable to carry out the requirements of this Clause; or

(c) where the Yang di-Pertuan Agong, or, in the case of a member of the public service of a State, the Ruler or Yang di-Pertua Negeri of that State, is satisfied that in the interests of the security of the Federation or any part thereof it is not expedient to carry out the requirements of this Clause; or

(d) where there has been made against a member of such a service any order of detention, supervision, restricted residence, banishment or deportation, or where there has been imposed on such a member any form of restriction or supervision by bond or otherwise, under any law relating to the security of the Federation or any part thereof, prevention of crime, preventive detention, restricted residence, banishment, immigration, or protection of women and girls:

> Provided further that for the purpose of this Article, where the service of a member of such a service is terminated in the public interest under any law for the time being in force or under any regulation made by the Yang di-Pertuan Agong under Clause (2) of Article 132, such termination of service shall not constitute dismissal whether or not the decision to terminate the service is connected with the misconduct of or unsatisfactory performance of duty by such member in relation to his office or the consequences of the termination involved an element of punishment; and this proviso shall be deemed to have been an integral part of this Article as from Merdeka Day.

[21] It is not in dispute and indeed as found by the courts below that in the present case the offences disclosed in the charges were admitted by the appellant. It was therefore of little consequence when the DB found him guilty of the offences as charged.

[22] Having found him guilty, must the DB hear his mitigation before imposing the punishment appropriate for the offences? In *Utra Badi* case this court held that 'there is certainly no separate right to make representations upon the punishment that ought to be meted out to the officer to be dismissed or reduced in rank'. Thus, the question to ask is whether this court was correct in coming to such a conclusion which was arrived at after considering several earlier judicial decisions both local and foreign.

[23] And in considering the foregoing question it is noted that this court also held in *Utra Badi* case that the view expressed by Salleh Abas LP in *Inspector-General of Police & Anor v Alan Noor bin Kamat* [1988] 1 MLJ 260 was part of the ratio decidendi of the judgment in that case. As such that view was followed by this court in its judgment in *Utra Badi* case. This is what was said at p 262:

> As it stands, this passage appears to be misleading. This passage should be read in the light of the factual situation of this case, wherein the show cause letter dated 14 May 1980 was completely silent as to the contemplated punishment to be imposed at the end of the disciplinary proceedings. Therefore, in order to ensure that the respondent understood and appreciated the seriousness of the proceedings he was facing, the learned trial judge was right in insisting that another chance must be given to him, which he called a plea of mitigation. *If, however, the show cause letter had included the proposed punishment, for example, by the inclusion of such statement as 'This proceeding is taken against you with a view to dismissal or reduction in rank …' or 'This proceeding is taken under GO 'D' 30 with a view to dismissal or reduction in rank …', or such other phraseology as would give the effect of making the respondent understand the nature of the proceedings and what they would lead to, there is no necessity for the appellants to give another opportunity of being heard before the punishment is imposed.* (Emphasis added.)

[24] However, the Court of Appeal as well as the High Court in *Utra Badi* case held that what was said by Salleh Abas LP was mere obiter and that they were not bound by it. As such both courts below went on to hold that there was a right to mitigate before punishment should be imposed for disciplinary offence. This is how two of the Court of Appeal judges respectively expressed their views — *Lembaga Tatatertib Perkhidmatan Awam, Hospital Besar Pulau Pinang v Utra Badi a/l K Perumal* [2000] 3 MLJ 281:

Per Gopal Sri Ram JCA (as he then was) said at pp 286–296:

> The issue in this appeal concerns the right to procedural fairness. It is a constitutional right. It forms one of the cornerstones of our public law jurisprudence. It is an issue which our courts have already dealt with in several cases … Although the content of procedural fairness is well settled, its application varies according to the facts of each particular case. It is necessary to allude to the factual matrix relevant to this appeal in order to appreciate the issues …
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> To recapitulate, in *Inspector-General of Police & Anor v Alan Noor bin Kamat* [1988] 1 MLJ 260, Ajaib Singh J, at first instance, took the view that the disciplinary process involved two separate exercises, the first a finding as to guilt and the second as to punishment. However, the Supreme Court was of opinion that both guilt and punishment are to be considered in one composite exercise. That, in essence, is the difference in the approach.
>
> With much respect, I am unable to accept the view subscribed to by the Supreme Court. In my judgment, save in those cases falling under Part III of the general orders, there are two separate and distinct steps in the public service disciplinary process. The first step is for the disciplinary authority to decide upon the issue of guilt or innocence. If the decision is in favour of the employee, that is the end of the matter. But if the relevant authority finds the public servant guilty, then, and then only, does the question of punishment arise. And as may be seen from general order 36, that there is a wide choice in the type of punishment that may be meted out. As may be seen from general order 36, it ranges from a mere warning to the ultimate punishment of dismissal.
>
> The combined effect of arts 5(1) and 8(1) of the Federal Constitution is, in my judgment, to demand fairness both in procedure and in substance whenever a public law decision has an adverse effect on any of the facets of a person's life. See *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145; *Kumpulan Perangsang Selangor Bhd v Zaid bin Hj Mohd Noh* [1997] 1 MLJ 789. Among these facets are a person's livelihood and his reputation.
>
> Procedural fairness demands not only the right in a public servant to make representations on the truth of the charges framed against him. It includes the right, after a finding of guilt is made against him, to make representations on the question of punishment. That this must be the case may be seen by examining the disciplinary process itself. In my view, the obiter dictum of the Supreme Court in *Inspector-General of Police & Anor v Alan Noor bin Kamat* is plainly wrong. It was expressed without the benefit of a mature argument upon the combined effect of arts 5(1) and 8(1) of the Federal Constitution.

> I am therefore satisfied that both Ajaib Singh J's remark at first instance and the Supreme Court's comment upon it on the appeal in *Inspector-General of Police & Anor v Alan Noor bin Kamat* are both merely obiter dicta as they were unnecessary for the actual decision in that case. It follows that I am in agreement with the learned trial judge in his interpretation of that case.

(Incidentally, it may be noted that Gopal Sri Ram JCA (as he then was) was a member of the panel in the Court of Appeal which heard and dismissed the appellant's appeal in the present case: *Ghanasekaran a/l Krishnasamy v Suruhanjaya Perkhidmatan Awam Malaysia and Anor* [2009] 3 MLJ 798).

Per Siti Norma Yaakob JCA (as she then was) said at pp 302–303:

> From the language of the show cause letter and in the light of the alternative punishments that might be imposed on the respondent, it was my considered opinion that the respondent should have been given the opportunity to plead in mitigation before any punishment was meted against him. This reasoning, I say runs in line with the provisions of general order 23 which states that in all disciplinary proceedings under Part II of the Code, no officer shall be dismissed or reduced in rank unless he has been afforded a reasonable opportunity of being heard. My reasoning, too, harmonises with the provisions of art 135(2) of the Federal Constitution which provides that no member of the public service 'shall be dismissed or reduced in rank without being given (a) reasonable opportunity of being heard'.
>
> In the circumstances of this appeal, I say that the right to be heard extended not only to the first stage of the proceedings before the first appellant but also to the second stage before punishment was passed. In this instance, the first appellant accorded the respondent the opportunity to be heard in answer to the charge but had denied his right to plead in mitigation before dismissing him. Since dismissal has been identified by the first appellant to be one of two punishments that could be imposed on the respondent and I am mindful that dismissal is the most extreme punishment that could befall a public servant, justice and fair play dictate that the right to plead in mitigation should have been accorded to the respondent although general order 26 of the Code under which these proceedings were brought is silent on this score. Under these circumstances, I say that the proceedings before the first appellant were flawed in that there had been procedural unfairness and as such cannot be sustained.

[25] On appeal this court after chastising the Court of Appeal for not accepting 'loyally the decision of the higher tiers' (obviously referring to *Inspector-General of Police & Anor v Alan Noor bin Kamat*) allowed the appeal by the appellant; *Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v Utra Badi a/l K Perumal* [2001] 2 MLJ 417, premised on these words at pp 431–432 and 439–440:

> On a proper analysis of the cases cited, however, we were of the considered opinion that the remarks made in *Alan Noor bin Kamat*'s case formed part of the ratio. It was not a mere chance remark, nor a subsidiary reason for the main principle and the finding was quite necessary for the decision reached.

A In effect, the above provision prescribes that the respondent can only be dismissed if he has been given a reasonable opportunity to be heard. As submitted by learned leading senior federal counsel that the letter to the respondent to show cause dated 31 January 1991 conveyed with sufficient clarity and certainty the contemplated punishment, namely dismissal or reduction in rank. The grounds were fully spelt out in the letter and the charge was well drafted as it laid down all the important and relevant particulars. Any reasonable person would have had no difficulty in responding to the allegations made. The opportunity, reasonable and sufficient, was given to the respondent to make a representation to rebut the charge.

In essence, the undoubted overall effect of the show cause letter illustrated that the respondent had at the earliest available moment been informed of the two possible punishments under consideration should he not be able to exculpate himself of the charge made. With all these in mind, he had been accorded every opportunity to defend himself. This was, in fact, what the respondent did by a letter dated 7 February 1991.

D However, he made no representation as regards punishment, though he had been made aware of the two possibilities. Can he now say that he had been deprived of that opportunity?

E The issue that arises is whether, with art 135(2) of the Constitution in mind, that provision gave the respondent the right to make a plea in mitigation before punishment is imposed.

...

F We next look at para (4) of general order 26 of the General Orders which is the very paragraph affecting the leave question. As stated earlier in this judgment, it reads:

> (4) If the officer does not furnish any representation within the specified time, or
G if he furnishes a representation which fails to exculpate himself to the satisfaction of the appropriate Disciplinary Authority, it shall then proceed to consider and decide on the dismissal or reduction in rank of the officer.

H Would the words 'it shall then proceed to consider and decide on the dismissal or reduction in rank of the officer' mean that there should be another separate hearing just to consider that after asking for the officer's views again? We do not think so.

...

I Taking all the above into consideration, we are of the view that the general orders, in detailing the procedures therein, have sufficiently complied with art 135(2) of the Federal Constitution and, in the process, are in accord with the concept of natural justice and procedural fairness. As succinctly stated by learned leading senior federal counsel in his submissions and as propounded in the long line of authorities

considered, *there is certainly no separate right to make representations upon the punishment that ought to be meted out to the officer to be dismissed or reduced in rank. In fact, under para (4) of general order 26 of the General Orders, the first appellant is not even required to make a finding of guilt which strongly indicates that there is only one hearing for a show cause letter issued under that general order. We therefore find that no injustice had been occasioned to the respondent by the failure to hear his mitigation separately*. (Emphasis added.)

[26] At the outset we do not think we should make any conclusion whether the view expressed by Salleh Abas LP in *Alan Noor bin Kamat*'s case was a ratio or an obiter. In our view it does not matter for whichever it is our primary task is to determine whether the assertion by the appellant against the conclusion in *Utra Badi* case is justified. After all this court is not necessarily bound by its own earlier decision and may depart from it where necessary (see *Tan Ying Hong v Tan Sian San & Ors* [2010] 2 MLJ 1; [2010] 2 CLJ 269).

[27] The appellant urges us to depart from the decision of this court in *Utra Badi* case as the decision has failed to comply with the rules of natural justice and against logic. In other words the approach taken by the Court of Appeal should be adopted.

[28] At first blush what were said by the learned judges of the Court of Appeal in *Utra Badi* case seemed appealing and convincing. However, with due respect, we are of the opinion that in expressing their views the learned judges read into the relevant provisions the concept of natural justice and probably much influenced by the scheme 'guilt or innocence' as in a criminal case without giving much consideration to the wordings and the implications of the provisions themselves.

[29] We would further say that the overall scheme of the Public Officers (Conduct and Discipline) (Chapter D) of the GO should be duly considered and not to read in isolation each of the provision in order 26(4). Bearing therefore this in mind and having read the reasons of this court in *Utra Badi* case we are inclined to agree with the conclusion thereof.

[30] Indeed we note that much reliance was placed by the Court of Appeal in *Utra Badi* case on decisions by the Indian courts and so did learned counsel for the appellant before us. However, as discussed by this court in *Utra Badi* case and in the cases referred therein reliance on those Indian cases must be done with care. Basically the Indian courts were interpreting a legislation whose wordings were quite different. For instance the Indian courts were concerned with the meaning of the phrase 'until he has been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him' (art 311(2)) of the Indian Constitution whereas in art 135(2) of our

Federal Constitution it only provides 'a reasonable opportunity to be heard'. As indicated in those cases the requirements differ.

[31] As noted above the Court of Appeal in *Utra Badi* case read into the relevant provisions of Public Officers (Conduct and Discipline) (Chapter D) of the GO and in particular order 26 the concept of natural justice when their wordings are clear and unambiguous. It should be borne in mind that the procedures prescribed therein are not intended to find the guilt or innocence of an officer charged as in a criminal trial. Further, the finding of guilt in disciplinary action under the GO should not be equated with the kind of guilt as in any criminal case. Enquiry in disciplinary cases is not and should not take the colour of a criminal trial. To that extent we agree, as was this court in *Utra Badi* case, with the view expressed by the learned High Court judge in *Halimatussaadiah v Public Service Commission, Malaysia & Anor* [1992] 1 MLJ 513 that ' order 26(4) of the GO 'D' does not require the PSC to make such finding. What the PSC is required to decide is whether the explanation given by the plaintiff, had exculpated the plaintiff to the satisfaction of the PSC'.

[32] Of course we are conscious of the contention that an officer facing disciplinary action should not be compelled to make his plea in mitigation within his representation as that would be prejudicial to him since at that stage he is yet to be found 'guilty' of the charge preferred against him.

[33] However, as explained in *Utra Badi* case and in the earlier cases, the relevant provisions in the Public Officers (Conduct and Discipline) (Chapter D) of the GO provide clear procedures and steps to be taken against an officer facing a disciplinary action. For instance, under order 26, a prima facie case must be found first in a complaint against an officer before a charge is served on him. And in the charge itself the officer is made aware of the possible punishments if he fails to make his representation or if it does not exculpate him. In fact under order 26(4) punishment is only imposed in an obvious and clear case of 'guilt' as per charge. Otherwise the DB has to consider the subsequent provisions therein which we think deal with cases where there is real dispute or denial by an officer of the allegation against him. Where no representation is made or there is admission to the disciplinary offence or that the representation does not exculpate the officer, order 26(4) should apply.

[34] We find it quite glaring the flaw in the assertion made before us by the appellant. For instance, where an officer is served with a show cause letter stating the disciplinary offence he is alleged to have committed and the possible punishment that could be imposed against him, does not make any representation as requested or admit to the disciplinary offence as in the instant case or the representation is obviously without merit and does not exculpate him, should another hearing or representation be afforded to him before

punishment is imposed? We do not think so. Would such hearing be an exercise in futility? We think so. After all in the event that further clarification is required order 26(5) and the subsequent provisions thereof of the GO are available to be complied with accordingly.

[35] Reverting to this present case, the appellant admitted to the disciplinary offences as charged and sought for forgiveness. In such circumstance it could be said that on his own volition the appellant did make his plea of mitigation in the same representation. As such the DB was entitled 'to proceed to consider and decide on the dismissal or reduction in rank' of the appellant. Therefore the question of him being prejudiced does not arise.

[36] Thus, to say that the conclusion in *Utra Badi* case is contrary to the rules of natural justice and against logic is, in our view, overlooking the clear wordings of the relevant provisions and reading into them rules, concept or scheme which are not necessary when applying and enforcing those provisions in the GO.

[37] Accordingly, for the question posed we would answer it in two parts. Whether this court was right in its conclusion in *Utra Badi* case our answer is in the affirmative. Whether we should review the decision in *Utra Badi* case for the reasons stated by the appellant our answer is in the negative.

[38] This appeal is therefore dismissed with costs.

Appellant's appeal dismissed with costs.

Reported by Kohila Nesan